SUPREME COURT, U. S.
FILED
OCT 30 1973
MICHAEL RODAK, JR., CLERK

No. 73-462

In the Supreme Court of the United States

OCTOBER TERM, 1973

DONALD S. WEIR, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

that petitioner was estopped from asserting procedural error (Pet. App. 17-18).

The Court of Claims decision dismissing petitioner's suit is correct and further review is unwarranted.

1. The Court of Claims correctly concluded that petitioner's sworn admission of homosexuality, confirmed by a psychiatric evaluation, fully satisfied the requirements of the Army regulations that homosexuality must be verified before an individual can be discharged from the Army on that ground (Pet. App. 16-17). As the court noted, it would have been unreasonable to interpret the regulation "to require the Army to conduct an investigation of plaintiff's military associates or prior college and business associates especially where there was absolutely no indication that plaintiff was lying * * *" (Pet. App. 16-17). Moreover, longstanding agency interpretation confirms that a sworn admission of homosexuality plus psychiatric confirmation is sufficient for military discharge (Pet. App. 16). An agency's established interpretation of its own regulation is entitled to considerable weight.[1] See *Thorpe* v. *Housing Authority*, 393 U.S. 268; *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410.

2. The Court of Claims' alternative holding is also correct. As the court stated: "There is no doubt in the instant case that the government took a po-

---

[1] Moreover, the purpose of the regulation appears to be to prevent unfounded denunciations and defamatory charges by third parties, and to protect the Army against avoidance of military service by false confessions (see Pet. App. 16, 18). An inculpatory admission by a fully competent adult does not fall within either rationale.

sition detrimental to itself when it relied upon the 1965 statements of the plaintiff and granted a premature discharge from the Army to the man who had been trained at government expense" (Pet. App. 17). Therefore, the court correctly applied settled principles of equitable estoppel to prevent petitioner "from profiting from his earlier fabrications" (Pet. App. 18). See *Henneberger* v. *United States,* 187 Ct. Cl. 265, 407 F. 2d 1340; *Mahoning Investment Co.* v. *United States,* 78 Ct. Cl. 231, 3 F. Supp. 622, certiorari denied, 291 U.S. 675.

Contrary to petitioner's contention (Pet. 6-7), the Court of Claims' reversal of the Trial Commissioner's decision did not violate due process. Rule 147(b) of the Rules of the United States Court of Claims does not contain the same language, and need not be interpreted to establish the same standard of review, as Rule 52(a) of the Federal Rules of Civil Procedure, in keeping with differences between District Judges and Court of Claims Commissioners. In any event, a reviewing court is not limited to the clearly erroneous standard when reviewing the legal conclusions of the trier of the fact. *Shultz* v. *First Victoria National Bank,* 420 F. 2d 648 (C.A. 5); *Hebah* v. *United States,* 197 Ct. Cl. 729, 456 F. 2d 696. The Court of Claims adopted nearly all of the Trial Commissioner's findings, disagreeing only with his legal conclusions.[2]

---

[2] The Court of Claims failed to adopt nine findings of the Trial Commissioner, Findings of Fact, 19, 20, 23, 25, 29-31, 38-39 (Pet. App. 45-48, 50-52). None of these findings was dispositive of the legal issues in the case. In addition, the Court of Claims made three findings not included in the Trial Commissioner's report, Findings of Fact, 13, 17, 41 (Pet. App. 20, 21, 31).

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-462

DONALD S. WEIR, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner enlisted in the Army after graduation from college, but soon became dissatisfied with military life and sought to end his enlistment (Pet. App. 20). Petitioner told the base chaplain that he was a homosexual. The chaplain arranged for petitioner to be examined by the Mental Hygiene Consultation Service, where he was examined by a clinical psychologist in the presence of the chief psychiatrist. Their psychiatric report detailed the case history of homosexuality provided by petitioner, diagnosed petitioner as a homosexual, and recommended that he be discharged from the Army (Pet. App. 21-23).

Petitioner was then informed that an investigation of his homosexual activity was being conducted. After being informed of his legal rights, petitioner executed a sworn statement admitting his homosexuality, de-

clining counsel and waiving a hearing before a board of officers (Pet. App. 28-29). Petitioner later executed another statement, in which he recognized the adverse effect a "discharge under conditions other than honorable" might have upon civilian life (Pet. App. 29). In October 1965, petitioner was discharged from the Army under "conditions other than honorable" and reduced in rank to the lowest enlisted grade (Pet. App. 12-13).

In 1968, almost three years later, petitioner was dismissed from his civilian employment after it was discovered that he had falsified his employment application to conceal the nature of his discharge (Pet. App. 31). Petitioner filed an application with the Army Discharge Review Board to change his discharge, in which he alleged that his 1965 statement that he was a homosexual was false. The Board found that petitioner had been properly discharged (Pet. App. 31), and his subsequent application for review to the Army Board for Correction of Military Records was denied (Pet. App. 31).

Petitioner then filed a petition in the Court of Claims, seeking a money judgment for the pay covering the remainder of his enlistment, restoration to his "rightful" grade, consideration for promotion, and the grant of an honorable discharge (Pet. App. 14). The Court of Claims, reversing its trial commissioner, unanimously upheld the decision of the Board for Correction of Military Records (Pet. App. 18). The court rejected petitioner's claim that the Army violated its own regulations by conducting an inadequate investigation of his case; it concluded that "there was no procedural violation, but rather full adherence to appropriate Army regulations" (Pet. App. 17). The court held alternatively

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

1001-1973-10